

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston**

JEFFERSON COUNTY COMMISSION, et. al.
Plaintiffs,

and

THORNTON COOPER,
Intervening Plaintiff,

v.

**Civil Action No. 2:11-CV-00989
(Honorable King, Bailey, Berger)**

**NATALIE TENNANT, *in her capacity as*
The Secretary of State, et al.,**
Defendants.

**JOINT RESPONSE OF DEFENDANTS JEFFREY KESSLER AND RICHARD
THOMPSON IN OPPOSITION TO PLAINTIFFS JEFFERSON COUNTY
COMMISSION, PATRICA NOLAND, AND DALE MANUAL'S
COMBINED MOTION TO STRIKE**

Jeffrey Kessler and Richard Thompson, by counsel, respond in opposition to Plaintiff's Combined Motion to Strike the Transcript of the Senate Redistricting Committee's August 4, 2011 meeting during which the Committee considered congressional redistricting plans and ultimately adopted the plan that passed both Houses of the Legislature as S.B. 1008 and was signed into law by the Governor.

Plaintiffs contend that "[e]xhibit O is an unauthenticated document which is not a part of the legislative record and is inadmissible under the Federal Rules of Evidence and FRCP 44(a)." (Pl's Mot. to Strike, Document 49, at 1-2) Plaintiffs further contend that there is no official record of the Senate consideration of S.B. 1008 other than the materials Plaintiffs offered in their Notice of Intent to Offer Exhibits. (Id. at 3)

On August 5, 2011, the Senate Majority Leader asked unanimous consent that the transcript of the August 4, 2011 Select Redistricting Committee meeting be printed in the Appendix to the Senate Journal. (See Journal of the Senate, Aug. 5, 2011 at 54, attached as Ex. M to Joint Opening Br., Document 42, also attached as Ex. A to this filing) The Senate gave unanimous consent and the Transcript was made a part of the official Senate record.

President Kessler and Speaker Thompson offered as Exhibit AA to their Opening Brief a certification from Darrell E. Holmes, the Clerk of the West Virginia Senate. The certification states that the Select Committee on Redistricting Meeting Transcript from August 4, 2011, among other records, is a true and accurate copy of the records of the Senate. The certification was signed under oath by the Clerk, and was notarized. (See Ex. AA to Joint Opening Br., Document 42, also attached as Ex. B to this filing) Plaintiffs' Combined Motion to Strike offers no evidence to contradict the Clerk's certification that the Transcript is a part of the Senate Record of the consideration of S.B. 1008.

Under West Virginia law, the Clerk of the Senate is the official with legal custody of the records of the West Virginia Senate. W. VA. CODE § 4-1-12 ("The journals, papers and documents of each house shall be in the custody of its clerk, and copies thereof may be certified by him") A proper means of proving an official record under the Federal Rules of Civil Procedure is to present "a copy attested by the officer with legal custody of the record . . . accompanied by a certificate that the officer has custody." Fed. R. Civ. P. 44(a). Here, the Clerk has attested that the transcript is a part of the record, and a West Virginia statute makes clear that the Clerk is the legal custodian of the record. Because the Clerk is the proper custodian, his certification also complies with the self authentication requirement of Federal Rule of Evidence 902.

The transcript shows that at the August 4, 2011 Select Redistricting Committee meeting, Senators gave consideration to alternate redistricting proposals, discussed their policy objectives, and most importantly, were fully informed as to the requirements of the federal and state constitutional requirements with respect to congressional redistricting. It is therefore unsurprising that Plaintiffs would ask the Court not to look at the transcript, and in effect, pretend that the Senate's detailed consideration of S.B. 1008 never took place. While Plaintiffs would have the Court exclude important evidence, President Kessler and Speaker Thompson believe that the Court should give due consideration to the legislative record in determining whether the minor population variance in S.B. 1008 has been adequately justified. Accordingly, the Plaintiffs' Combined Motion to Strike should be denied.

**JEFFREY KESSLER, in his capacity
as President of the West Virginia Senate**

/s/ George E. Carenbauer

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**RICHARD THOMPSON, in his capacity as
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2011, I electronically filed the foregoing “**Joint Response Defendants Jeffrey Kessler and Richard Thompson to Plaintiffs Jefferson County Commission, Patricia Noland, and Dale Manual’s Combined Motion to Strike**” with the Clerk of the Court using the CM/ECF system which will provide notice to counsel of record as follows:

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